IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs November 29, 2006

TERRANCE E. AKINS v. STATE OF TENNESSEE

Appeal from the Circuit Court for Williamson County
No. 203-079 Jeffrey S. Bivins, Judge

No. M2005-02215-CCA-R3-PC - Filed January 22, 2007

The Appellant, Terrance E. Akins, appeals the dismissal of his petition for post-conviction relief by the Williamson County Circuit Court. Akins is currently serving a sentence of twenty years, as a violent offender, stemming from his conviction of especially aggravated robbery. Subsequent to his indictment, Akins was appointed counsel; however, shortly thereafter, he began communicating to the court his desire to waive his Sixth Amendment right to counsel and exercise his right to represent himself at trial. Ultimately, Akins filed a motion that he be permitted to represent himself, and, after a hearing, the trial court granted the motion permitting Akins to proceed *pro se*. Following his conviction, Akins filed a petition for post-conviction relief upon the ground that the "waiver of his right to counsel, and decision to proceed *pro se* was not intelligently, knowingly and voluntarily made." The post-conviction court denied relief, and this appeal followed. After review, the judgment of the post-conviction court is affirmed.

Tenn. R. App. P. 3; Judgment of the Circuit Court Affirmed

DAVID G. HAYES, J., delivered the opinion of the court, in which ALAN E. GLENN and D. KELLY THOMAS, JR., JJ., joined.

Patrick G. Frogge (on appeal), Nashville, Tennessee; Larry Drolsum (at trial), Franklin, Tennessee, for the Appellant, Terrance E. Akins.

Robert E. Cooper, Jr., Attorney General and Reporter; Brent C. Cherry, Assistant Attorney General; and Derek K. Smith, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

Procedural History

On September 9, 1997, the seventeen-year-old Appellant was charged, in a juvenile petition, with the delinquent act of aggravated robbery. Also charged were two adults and another juvenile. On September 25, 1997, the juvenile court transferred the Appellant to the Williamson County

Circuit Court to stand trial as an adult. On October 13, 1997, a Williamson County grand jury indicted the Appellant for especially aggravated robbery, and, following his arraignment, the trial court appointed counsel to represent him. During the course of the juvenile and circuit court proceedings, the Appellant wrote both the juvenile court and the circuit court judges requesting that he be permitted to represent himself. On March 12, 1998, the Appellant filed a formal "Motion for Defendant to be Allowed to Represent Himself at Trial."[1] An excerpt of the lengthy colloquy that occurred between the Appellant and the trial court at the motion hearing is noted as follows:

> THE COURT: I want to tell you truthfully, that I think you're making a serious mistake. You don't know the rules of evidence, you don't know criminal procedure, you've never been involved in a court proceeding. And the penalties for the offense that you're charged with are great. I think you would be much better off to be represented by a trained attorney in this case. But knowing all that, after all I've told you and all we've talked about, do you still want to represent yourself?
>
> [APPELLANT]: Yes, sir.
>
> THE COURT: Why is that?
>
> [APPELLANT]: Because I feel in my heart that it's the right thing to do.
>
> . . . .
>
> THE COURT: Mr. Akins, has any other person tried to influence you to do this?

---

[1]The motion was supported by the Appellant's affidavit which stated, in pertinent part:

> 5. After careful consideration by myself and after discussions with my attorney, I wish to act as my own attorney at trial.
>
> 6. I am making this decision freely and voluntarily.
>
> 7. I am aware that my attorney has advised against this.
>
> 8. I am aware that I have an absolute right to be represented by an attorney at trial. I am also aware that I have the constitutional right to act as my own attorney and I choose to act as my own attorney.
>
> . . . .
>
> 12. Pursuant to State v. Herrod, I declare
>
> A. That I do chose to assert my right to self representation.
> B. I clearly and unequivocally state that it is my desire to act as my own attorney at the trial of this matter.
> C. I am aware of my absolute right to be represented by counsel and [I] freely and voluntarily give up that right so I may represent myself.

[APPELLANT]: No, sir.
THE COURT: Is this a free and voluntary act?
[APPELLANT]: Yes, sir.
THE COURT: Has anyone else encouraged you to do this?
[APPELLANT]: No, sir.
THE COURT: Has anyone else suggested that you do this?
[APPELLANT]: No, sir.
[TRIAL COUNSEL]: [I]n fact, I did advise you, as the judge did advise you against this and said this probably was not a good idea?
[APPELLANT]: Yes, sir.
. . . .
THE COURT: [Y]ou still want to represent yourself.
[APPELLANT]: Yes, sir.

Following this colloquy, the Appellant reviewed and signed a written waiver of his right to counsel, as required by Rule 44(b) of the Tennessee Rules of Criminal Procedure. At the conclusion of the hearing, the trial court granted the Appellant's motion permitting him to represent himself at trial.[2]

The Appellant and a co-defendant were jointly tried, and, after a three-day trial, both were convicted of especially aggravated robbery. *State v. Cecil L. Groomes, et al*., No. M1998-00122-CCA-R3-CD (Tenn. Crim. App. at Nashville, Aug. 10, 2000). As a result of his Class A felony conviction, the Appellant was sentenced to serve twenty years in confinement as a violent offender. *Id*. The Appellant's conviction was affirmed on appeal. *Id*.

On February 12, 2003, the Appellant filed a *pro se* petition for post-conviction relief alleging, among other grounds, that he did not make a voluntary and intelligent waiver of his right to counsel. Counsel was appointed, and an amended petition was filed. A post-conviction hearing was held on April 5, 2005, at which only the Appellant and trial counsel testified. At the hearing, the Appellant testified that he knew he needed an attorney to represent him during his trial in circuit court and that he did not want to waive his right to counsel. However, he testified that his mother told him to represent himself because she didn't trust the judicial system and believed everybody wanted to convict him. Nonetheless, he acknowledged that his mother had a mental illness and was "out of the picture" before he was indicted on October 13, 1997. Nevertheless, he persisted in his request to represent himself.

The post-conviction court denied relief by written order on August 19, 2005, and this timely appeal followed.

[2]Notwithstanding the Appellant's motion that appointed counsel be discharged and that he be permitted to represent himself, the Appellant did request that appointed counsel serve as "elbow counsel," which was permitted by the trial court.

Analysis

On appeal, the Appellant challenges the post-conviction court's denial of his petition for post-conviction relief. A court may grant post-conviction relief when the conviction or sentence is void or voidable because of the abridgement of any right guaranteed by the Constitution of Tennessee or the Constitution of the United States. T.C.A. § 40-30-103 (2003). A defendant must prove his or her factual allegations by clear and convincing evidence at an evidentiary hearing. T.C.A. § 40-30-110(f); *Granderson v. State*, 197 S.W.3d 782, 790 (Tenn. Crim. App. 2006). The post-conviction court's findings of fact are conclusive on appeal unless the evidence preponderates otherwise. *State v. Burns*, 6 S.W.3d 453, 461 (Tenn. 1999). This court will afford those findings of fact the weight of a jury verdict, and this court is bound by the court's findings unless the evidence in the record preponderates against those findings. *Henley v. State*, 960 S.W.2d 572, 578 (Tenn. 1997); *Alley v. State*, 958 S.W.2d 138, 147 (Tenn. Crim. App. 1997). This court may not reweigh or re-evaluate the evidence, nor substitute its inferences for those drawn by the post-conviction court. *State v. Honeycutt*, 54 S.W.3d 762, 766 (Tenn. 2001). All questions concerning the credibility of the witnesses, the weight and value to be given their testimony, and the factual issues raised by the evidence are to be resolved by the trial judge, not the appellate courts. *Momon v. State*, 18 S.W.3d 152, 156 (Tenn. 1999); *Henley*, 960 S.W.2d at 578-79. However, the post-conviction court's conclusions of law are reviewed under a purely *de novo* standard of correctness. *Fields v. State*, 40 S.W.3d 450, 458 (Tenn. 2001).

On appeal, the Appellant specifically argues that relief is warranted because "he did not intelligently, knowingly, and voluntarily waive his constitutional right to counsel and the trial court's hearing to determine whether [he] should proceed *pro se* was wholly inadequate to safeguard his right to counsel." In support of his argument, he asserts that he relied on the advice of his mother, who was mentally ill, when he advised the trial court that he wanted to represent himself. Moreover, he asserts that the trial court erred when it granted his motion to represent himself because he informed the court that he had a tenth grade education, did not know the rules of evidence or procedure, and could not define the elements of the indicted offense or the range of punishment.

A defendant in a criminal prosecution has a constitutional right to represent himself and proceed *pro se* without the assistance of counsel. U.S. Const. Amend VI; Tenn. Const. art. I, § 9; *Faretta v. California*, 422 U.S. 806, 821, 95 S. Ct. 2525, 2534 (1975) (holding the Sixth Amendment implicitly provides an affirmative right of self-representation). The right of self-representation generally must be honored even if the trial court believes that the defendant would benefit from the advice of counsel. *Faretta*, 422 U.S. at 834, 95 S. Ct. at 2540; *see also McKaskle v. Wiggins*, 465 U.S.168, 177 n.8, 104 S. Ct. 944, 950 n.8 (1984). Since an exercise of the right to self-representation includes a waiver of a right to counsel, the exercise of the right to self-representation must be evaluated by using many of the same criteria that are applied to determine whether a defendant has waived the right to counsel. First, an assertion of the right of self-representation must be timely. *State v. Herrod*, 754 S.W.2d 627, 629 (Tenn. Crim. App. 1988). Second, the assertion of the right must be clear and equivocal. *Faretta*, 422 U.S. at 835, 95 S. Ct. at 2541; *Herrod*, 754 S.W.2d at 627. Third, the assertion of the right must be knowing, intelligent and voluntary. *Godinez v. Moran*,

509 U.S. 389, 400-01, 113 S. Ct. 2680, 2687 (1993); *Faretta*, 422 U.S. at 835, 95 S. Ct. at 2541; *Herrod*, 754 S.W.2d at 629-30. If a defendant's right to self-representation has been violated, he is entitled to relief even if he cannot show prejudice. *Flanagan v. United States*, 465 U.S. 259, 268, 104 S. Ct. 1051, 1056 (1984) (obtaining reversal for a violation of "right to represent oneself . . . does not require a showing of prejudice to the defense"); *Wilson v. Mintzes*, 761 F.2d 275, 286 (6th Cir. 1985); *Herrod*, 754 S.W.2d at 630.

When a defendant requests to proceed *pro se*, the trial judge must conduct a thorough inquiry to determine if the defendant's decision is knowingly, intelligently, and voluntarily made. Tenn. R. Crim. P. 44; *see also State v. Armes*, 673 S.W.2d 174, 177 (Tenn. Crim. App. 1984). "The serious and weighty responsibility . . . of determining whether there is an intelligent and competent waiver" rests on the trial judge. *Johnson v. Zerbst*, 304 U.S. 458, 465, 58 S. Ct. 1019, 1023 (1938). In a subsequent case, the Supreme Court elaborated on the criteria to use in evaluating a defendant's request:

> [A] judge must investigate as long and as thoroughly as the circumstances of the case before him demand. The fact that an accused may tell him that he is informed of his right to counsel and desires to waive this right does not automatically end the judge's responsibility. To be valid such waiver must be made with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter. A judge can make certain that an accused's professed waiver of counsel is understandingly and wisely made only from a penetrating and comprehensive examination of all the circumstances under which such a plea is tendered.

Von Moltke v. Gillies, 332 U.S. 708, 723-24, 68 S. Ct. 316, 323 (1948). Rule 44(a) of the Tennessee Rules of Criminal Procedure establishes similar criteria in reviewing a defendant's request to waive his right to counsel. The Rule states, in pertinent part:

> The court shall [before accepting the waiver] determine whether there has been a competent and intelligent waiver of such right by inquiring into the background, experience and conduct of the accused and such other matters as the court may deem appropriate.

Tenn. R. Crim. P. 44(a) (1998); *see also State v. Gardner*, 626 S.W.2d 721, 723 (Tenn. Crim. App. 1981). Additionally, this court has recommended that the trial courts question a defendant according to the guidelines contained in *1 Bench Book for United States District Judges* 1.02-2 to -5 (3rd ed. 1986).

In denying post-conviction relief, the court specifically found:

> The Petitioner . . . claims that he did not knowingly and voluntarily waive his right to counsel for the trial of this matter. . . . [t]he trial judge carefully questioned the Petitioner and clearly found the waiver to be knowing and voluntary. The Petitioner has failed to provide any valid evidence to support such a claim. Therefore, the Petitioner has failed to demonstrate that his due process rights were violated on this issue.

Initially, the Appellant contends that his waiver of his right to counsel was not intelligently, knowingly, and voluntarily made. We note that the Appellant's argument that the waiver was not knowingly and voluntarily made because he was eighteen years old and only had a tenth-grade education is wholly misplaced. A court's "determination that an accused lacks expertise or professional capabilities cannot justify denying the right of self-representation." *United States v. Bennett*, 539 F.2d 45, 51 (10th Cir.), *cert. denied*, 429 U.S. 925, 97 S. Ct. 327 (1976); *United States v. Baker*, 84 F.3d 1263, 1267 (10th Cir. 1996) (trial court deprived defendant of right of self-representation even though defendant communicated in a "muddled manner" and lacked legal knowledge)*; Herrod*, 754 S.W.2d at 630. "A defendant need not himself have the skill and experience of a lawyer in order [to] competently and intelligently . . . choose self-representation." *Herrod*, 754 S.W.2d at 630 (quoting *Faretta*, 422 U.S. at 835, 95 S. Ct. at 2541). "In other words, the accused's 'technical legal knowledge' is irrelevant to the inquiry of whether an accused should be permitted to exercise his right of self-representation, . . . and, a court may not deny an accused the right to self-representation because the accused does not possess 'the basic knowledge of how a jury trial is conducted' or a knowledge of 'his rights.' [citations omitted]" *Herrod*, 754 S.W.2d at 630.

Our review of the record contradicts the Appellant's assertion with regard to his waiver. The record demonstrates that the Appellant asserted his request for self-representation in a timely manner and that his assertion was clear and unequivocal. Moreover, the decision was not made in haste. He wrote four letters to the juvenile and the circuit court, requesting that he be allowed to represent himself. He informed trial counsel that he wanted to represent himself, and he signed an affidavit to support his motion to represent himself. After the motion was filed, on March 12, 1998, he wrote the circuit court and confirmed that "I wish to represent myself." In the hearing on his motion for self-representation he stated several times that he wanted to represent himself. At no time did he indicate any doubt or reservations about his decision. We find nothing to preponderate against the court's findings that the Appellant did indeed intelligently, knowingly, and voluntarily waive his right to counsel.

The Appellant also argues that the trial court failed to conduct a sufficient inquiry to determine if his waiver of counsel was voluntary and intelligent. In support of his argument, the Appellant relies upon *State v. Northington*, 667 S.W.2d 57, 61 (Tenn. 1984), and *State v. John D. Ruff*, No. 02C01-9801-CR-00006 (Tenn. Crim. App. at Jackson, May 7, 1999). However, we conclude that both *Northington and Ruff* are distinguishable from the facts of the Appellant's case. In *Northington*, the trial court determined the age and education of the defendant; addressed the seriousness of the charges; advised the defendant he would be held to the same standards as an

attorney; and confirmed that the defendant had discussed his decision with his attorney. Nonetheless, our supreme court set aside the conviction because the trial court "failed to diligently examine the defendant's background and experience, failed to notify defendant as to the possible extent of any penitentiary sentence, and failed to elaborate fully to defendant why he thought it "unwise" to waive counsel." *Id.* at 61. In *Ruff*, the conviction was reversed because the trial court did not discuss possible punishments and failed to examine the defendant's background, education, and experience with the legal system. *Ruff*, No. 02C01-9801-CR-00006.

We conclude that the Appellant's case is more analogous to *State v. Goodwin*, 909 S.W.2d 35, 41 (Tenn. Crim. App. 1995), in which this court found Goodwin had made a valid waiver of his right to counsel. The trial court inquired into Goodwin's age and education; warned him against proceeding *pro se*; advised him an attorney would be provided for him, if needed; reminded him that he would not have access to legal resources; cautioned him that the trial would proceed at the same pace as if he were represented by counsel; and informed him he was responsible for understanding the rules of evidence and local rules of court. *Id.*

Our review indicates that the trial court's inquiry carefully tracks the sixteen questions listed in the bench book for federal judges, as well as additional relevant questions which were posed by the trial judge. The trial court advised the Appellant of the pitfalls of self-representation in more strongly worded language than that of the guidelines. The trial court reminded the Appellant that he had a right to be represented by counsel at every stage of his case and counsel would be appointed for him, and then confirmed that the Appellant still wished to give up his Sixth Amendment right to be represented by counsel. The trial court reviewed the Appellant's background, educational level, and experience with the legal systems, as well as the extent of possible punishment which the Appellant was facing. The Appellant stated that he was not familiar with the rules of evidence or procedure, but asked the trial court to allow trial counsel to advise him as "elbow counsel," which the court allowed. We conclude that the trial court conducted a thorough examination of the Appellant which was more than sufficient to determine that the Appellant's waiver was knowingly, intelligently, and voluntarily given. This issue is without merit.

CONCLUSION

Our review of the entire record affirmatively demonstrates that the Appellant's decision to waive his Sixth Amendment right to counsel and proceed *pro se* was made knowingly, intelligently, and voluntarily and as required by Rule 44, Tenn. R. Crim. P. Accordingly, we affirm the dismissal of the Appellant's petition for post-conviction relief by the Williamson County Circuit Court.

_____

DAVID G. HAYES, JUDGE